In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1454

H. R. JOHNSON AND JOHN B. JOHNSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 420 F. 2d 955. The district court did not write an opinion. Its order granting summary judgment in favor of the landowner appears at Pet. App. D.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1970. A petition for rehearing was denied on March 10, 1970. The petition for a writ of certiorari was filed on April 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in federal condemnation proceedings, the compensation fixed for one temporary taking is *res judicata* for a subsequent temporary taking.

STATEMENT

In 1953, the United States brought a condemnation action to obtain the use and occupancy of petitioners' lands in the Mojave Desert, on which an inactive gold mine operation was located. The government took a term commencing July 1, 1953, through June 30, 1954, extendible for subsequent yearly periods through June 30, 1960. In July 1958, a jury fixed compensation for this term taking at $2,700 per year and awarded the owners an additional $18,000 for restoration costs covering the buildings and equipment destroyed.

In 1960, the United States brought a second suit, to take a term running from July 1, 1960, through June 30, 1961, extendible for yearly periods until June 30, 1965. On October 6, 1960, the parties executed a consent judgment fixing the annual rental in the same amount as in the prior action, $2,700.

On June 30, 1965, the government commenced a third suit, the present action, for use and occupancy from July 1, 1965, through June 30, 1966, extendible for yearly periods until June 30, 1970. The landowners' answer asserted that the prior awards of $2,700 per year were *res judicata* for the third term taking. Their motion for summary judgment was granted, and the government appealed.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the doctrine of *res judicata* is inapplicable where the government brings successive condemnation actions. *Res judicata* applies only to suits between parties or their privies upon the same cause of action, and, the court explained, each temporary taking is a separate cause of action.

ARGUMENT

The court below properly concluded that, when the United States acquires a term occupancy of property, the Fifth Amendment requires that the landowner's just compensation must be determined as of the date of taking. *United States* v. *Miller,* 317 U.S. 369, 374. The measure of compensation for a temporary taking is the rental value of the property for the period for which it is held by the condemnor. *United States* v. *Pewee Coal Co.,* 341 U.S. 114, 117; *Kimball Laundry Co.* v. *United States,* 338 U.S. 1, 7; *United States* v. *Petty Motor Co.,* 327 U.S. 372, 378; *United States* v. *General Motors Corp.,* 323 U.S. 373, 382.

The government's obligation to pay compensation for the temporary taking of land arises either when it physically appropriates the land for public use,[1] or, alternatively, when it files a declaration of taking under 40 U.S.C. 258a, whichever date is earlier. *United States* v. *Dow,* 357 U.S. 17, 20–22. Each term taking gives rise to a separate cause of action and requires a fresh determination of the government's obligation under the Fifth Amendment to pay just compensation.

[1] In this instance, the landowner has the right to sue under the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491.

Petitioners' contention that the amount of just compensation fixed for one term taking is *res judicata* for subsequent term taking would, if accepted, bring about inherently unfair results. As observed in *United States* v. *Commodities Corp.*, 339 U.S. 121, 124, "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' * * *." The compensation to be paid must also be just "to the public which is to pay for it." *Searl* v. *School District, Lake County*, 133 U.S. 533, 562; *Olson* v. *United States*, 292 U.S. 246, 255. Land values and rentals fluctuate and in recent years generally have increased. To freeze the compensation fixed for one temporary taking for later takings would work substantial injustice on both condemnees and the government. When the issue under consideration is the valuation of land, passage of time alone amounts to the type of "change in circumstances" which precludes application of *res judicata*.[2]

Moreover, the United States submitted a substantial claim that the physical condition of the property had changed between the first and present takings. The United States condemned and paid compensation for improved property in the first taking. The present taking involved vacant property.

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[2] Petitioners' reference to the state law of landlord and tenant, including the principle of holdover tenancy, is plainly inapposite (Pet. 6). The United States has exercised the federal power of eminent domain. Its possession does not rest on a lease (which would be governed by federal law), and its continuance in possession is not a wrongful act of trespass.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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